Denise A. Dragoo (0908)
James P. Allen (11195)
SNELL & WILMER L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101
Telephone: 801-257-1900
Facsimile: 801-257-1800

Bennett E. Bayer *(Pro Hac Vice)*
Landrum & Shouse LLP
106 West Vine Street
Suite 800
Lexington, KY 40507
Telephone: 859-255-2424
Facsimile: 859-233-0308
Attorneys for Permittee
Alton Coal Development, LLC

BEFORE THE BOARD OF OIL, GAS, AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL PARKS CONSERVATION ASSOCIATION, Petitioners, v. DIVISION OF OIL, GAS, & MINING, Respondent, ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH, Respondent/Intervenors.	**PERMITTEE'S MEMORANDUM OPPOSING PETITIONER'S MOTION FOR CERTIFICATION OF BOARD MEMBERS** Docket No. 2009-019 Cause No. C/025/0005

Alton Coal Development, LLC ("**Alton**") by and through counsel and pursuant to Utah

Administrative Code R641-105-300 submits this MEMORANDUM OPPOSING PETITIONER'S MOTION FOR CERTIFICATION OF BOARD MEMBERS' STATUS CONCERNING FINANCIAL INTERESTS IN COAL MINING OPERATIONS AND FOR RECUSAL OF EACH BOARD MEMBER WHO HOLDS ANY SUCH INTEREST THAT THE BOARD'S DECISIONS MAY AFFECT in the above-captioned formal adjudicative proceeding before the Utah Board of Oil, Gas & Mining ("the Board"). The following sections explain, first, that the Board is not required to consider this motion because it has been filed almost four months after it should have been. Even if the motion were not time-barred, or if the Board wishes to suspend its rule and consider it anyway, the second and third sections below explain that neither prong of the "certify or recuse" ultimatum presented by Petitioners is supported by the applicable statutes or regulations.

I. PETITIONER'S MOTION FOR RECUSAL IS UNTIMELY BECAUSE IT WAS FILED ALMOST FOUR MONTHS FOLLOWING THEIR REQUEST FOR A HEARING

The Board's rules of practice require that all motions which are available to a petitioner at the time it files its initial Request for Agency Action must be filed at the same time. Utah Admin Code R641-105-300 (2009) ("All motions or responses to motions available to a petitioner or respondent at the time his or her Request for Agency Action or response is filed will be filed and served with the petition or response . . . ."). In this case, the Request for Agency Action was filed on November 19, 2009, sixteen weeks before the present motion was presented for the Board's consideration.

This motion, with its ultimatum demanding either each Board member's personal ad hoc certification or recusal, was available to Petitioners on the date the initial hearing request was

filed. The Board is composed of exactly the same members it was on November 19, 2009, the applicable Utah (and Federal) rules regarding recusal are unchanged, and Petitioners have identified no new fact, circumstance, or concern related to Board Members' interests in coal operations that were unknown four months ago. The motion of Petitioners, based entirely on legal argument, could certainly have been made at the outset of this proceeding, and is therefore required to have been filed and served at that time. There is simply no justification for offering the motion now, after numerous motions and memoranda have been presented and two public hearings have been held before the entire Board, rather than at the proper time under the Board's rules. For this reason, the Board should dismiss Petitioners' untimely motion.

II. RECUSAL BASED ON PROHIBITED FINANCIAL INTERESTS UNDER SMCRA IS UNNECESSARY BECAUSE NO BOARD MEMBER HAS EITHER A DIRECT OR INDIRECT INTEREST IN ALTON COAL DEVELOPMENT LLC

This board's rules applicable to review of coal mining permit approvals provide that "[m]embers of the Board will recuse themselves from proceedings which may affect their direct or indirect financial interests." Utah Admin. Code R645-101-130. "Direct financial interests" and "indirect financial interests" are both defined terms for the purposes of coal mine regulatory actions, and refer to ownership or other financial relationships. See Utah Admin. Code R645-100-200. The Utah rule and related definitions are substantially similar to their Federal counterparts. See 30 C.F.R. §§ 705.4(d), 705.5 (2009).

The bare possibility that any Board decision might become precedent in a future proceeding involving an entity in which a member has a financial interest does not warrant recusal (except, of course, in the future proceeding). This possibility, inherent in the structure of multi-interest boards such as Utah's, was considered and rejected as a basis for recusal by the

Office of Surface Mining when it promulgated its rule. Petitioners' reliance on this Federal analog to the Utah rule just cited is therefore misplaced.

> Several commenters expressed concern as to what connection between the multi-interest board member's interests and the member's action would invoke the requirement to recuse. . . . For example, what if a decision involves only one industry party, but the precedent to be established will affect other operators (including the operator in which a member has an interest)? . . . In the example mentioned by the commenter involving a proceeding where one of the parties is a coal company, a board or commission member would not have to be recused unless that member has a direct or indirect financial interest in the company which is a party to the proceeding.

Office of Surface Mining, Reclamation and Enforcement, Restrictions on Financial Interests of State Employees: Final Rule, 51 Fed. Reg. 37,118, 37,119 (Oct. 17, 1986) (emphasis supplied).[1]

Petitioners' reliance on the Fourth Circuit Court of Appeals decision in Tug Valley Recovery Center v. Watt is also misplaced, because the footnote they cite from the Tug Valley case construes a West Virginia statute that has been repealed. 703 F.2d 796, 800 n.5 (4th Cir. 1983); see 1985 W.Va. Acts ch. 77. While the Fourth Circuit noted that the earlier version of the statute did not explicitly permit a board member to be directly interest in coal mining, the current version does, so long as that board member does not participate in any proceeding involving the entity in which he is interested:

> Provided, That the member classed as experienced in coal mining . . . may receive significant financial compensation from regulated entities for professional services or regular employment so long as the professional or employment relationship is disclosed to the board. No member shall participate in any matter before the board related to a regulated entity from which the member receives or has received, within the preceding two years direct or indirect financial compensation.

---

[1] It would be reasonable for the Board to construe Utah's rule in the same manner that OSM construed its rule because the text of the rules is similar, and both rules implement the same statutory mandate. In any event, the Board is prohibited from promulgating rules that are more stringent than their federal counterparts without finding, after notice and public hearing, that a more stringent rule is needed to protect public safety or the environment. Utah Code § 40-10-6.5(3) (LexisNexis 2009). No such finding has been made.

W.Va. Code § 22B-4-1(c) (West 2010). Therefore, both the federal and state authorities cited by Petitioners actually contradict their position that Board members having *any* interest in *any* coal operation must recuse from *every* proceeding involving coal mining. The cited authorities articulate the more practical rule that recusal is necessary when a Board member has a financial interest in a party appearing before the Board in any matter of coal mining regulation.

In short, Petitioners are able to offer no legal authority for the recusal prong of their "certify or recuse" ultimatum. The correct legal standard applicable to Board members' interests in coal mining operations is the one set forth in the Board's rules: recusal is necessary when a member has a direct or indirect financial interest in an entity before the Board and subject to the effects of the Board's decision. In this case, no Board member has such an interest. Alton is a privately-held company, and the identities of its members and officers are known to Chris McCourt, Alton's Mine Manager. Mr. McCourt, who prepared the ownership and control information in the Permit Application, confirms in the attached declaration that no member of the Utah Board has any financial connection to Alton Coal Development. Declaration of Chris McCourt (March 18, 2010) (Exhibit 1.) Because the declaration conclusively proves the absence of a financial connection to any Board member, no member need recuse himself or herself based on the requirements of Rule R641-101-130, or its federal counterpart.

III. PETITIONERS' DEMAND FOR EACH MEMBER'S PERSONAL CERTIFICATION OF LACK OF FINANCIAL INTEREST IN COAL MINING IS UNJUSTIFIED

Utah's Coal Mining and Reclamation Act ("UCMRA") implements the conflict of interest procedures required by Congress under SMCRA. See Utah Code § 40-10-7. (Lexis Nexis 2009). Like the federal program and rules, the Utah regulatory scheme categorically prohibits

direct or indirect financial interests in coal mining operations for all "employees" of the Division performing duties under UCMRA regardless of whether their duties would affect any operation in which they have such an interest. Utah Code § 40-10-7(1). Consistent with the Federal scheme, the members of the Board are not included within this categorical prohibition. See Utah Code 40-10-3(7) ("Employee means those individuals in the employ of the division and excludes the board."); 30 C.F.R. § 705.5 "[M]embers of advisory boards or commissions established in accordance with State law or regulations to represent multiple interests are not considered to be employees"). The members of this Board, therefore, are not prohibited from performing their duties by reason of a financial connection to coal mining.

The regulatory scheme enacted by this Board pursuant to the mandate of SMCRA and UCMRA provides a comprehensive procedure for identifying and resolving financial interests that may conflict with the duties if its members or the Division's employees. See Utah Admin. Code R645-101. For the purposes of obtaining the required financial disclosures and preparing appropriate certifications, this Board's rules treat its members the same as division employees. See Utah Admin. Code R645-101-311 (Each Board member and employee must submit an annual statement of employment and financial interests to the Division Director); R645-101-341.300 (Director will certify that he has reviewed the information and resolved any prohibited interests). The Division Director is responsible for assuring OSM that all employees and Board members have complied with the conflict of interest rules. 30 C.F.R. § 705.4(4)–(5).

Because this comprehensive regulatory structure includes procedures and remedies for certifying that employees and members are free of prohibited conflicts, there is no legal requirement for the ad hoc personal certifications demanded in Petitioners' "certify or recuse"

ultimatum. Petitioners have provided no compelling reason for the Board to set aside the procedure it specified by rule for assuring compliance with SMCRA's conflict-of-interest provisions in favor of the ad hoc personal certifications they now demand. It is a well-settled rule of statutory construction that when a law provides a specific procedure or remedy courts should be reluctant to fashion additional remedies or procedures to achieve the same ends. See Northwest Airlines, Inc. v. Transport Workers Union of Amer., 451 U.S. 77, 97 (1981) (noting that the presumption against additional remedies is strong when they would augment an existing comprehensive legislative scheme.) In administrative law, courts are forbidden to prescribe additional procedures for administrative agencies beyond those set forth in statute. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Def. Council, 435 U.S. 519, 545–46 (1983).

Of course, this Board is not a court, and Alton takes no position on whether the Board would abuse its discretion by choosing, in this instance, to prepare the certifications Petitioners demand. If the courts would find no reason to compel that result, however, it follows that Sierra Club goes too far by arguing that the Board must choose that procedure. The ad hoc personal certifications are unnecessary, and Petitioners' motion for recusal of any Board Member not providing one should be denied.

CONCLUSION

Petitioners' inexcusable delay in presenting this motion to the Board, four months after their initial request for hearing, after the Board has held two hearings and considered and decided numerous other motions in the case, violates the Board's rules for filing the motion and prohibits its consideration. Even if the motion were permissible, it should be denied because it presents a false ultimatum. Neither ad hoc personal certification nor recusal based on interests in coal

operations other than Alton is essential under the comprehensive scheme established to assure coal mining regulations is free of inappropriate financial entanglements. The motion should be dismissed as untimely or denied as unnecessary.

RESPECTFULLY SUBMITTED this 23rd day of March, 2010.

Snell & Wilmer L.L.P.
Denise A. Dragoo
James P. Allen

Landrum & Shouse LLP
Bennett E. Bayer *(Pro Hac Vice)*
Attorneys for Intervenor-Respondent
Alton Coal Development, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2010, I mailed a true and correct copy of the foregoing **PERMITTEE'S MEMORANDUM OPPOSING PETITIONER'S MOTION FOR CERTIFICATION OF BOARD MEMEBERS,** via e-mail and United States mail, postage prepaid, to the following:

Stephen Bloch, Esq. (**steve@suwa.org**)
Tiffany Bartz, Esq.(**tiffany@suwa.org**)
Southern Utah Wilderness Alliance
425 East 100 South
Salt Lake City, Utah 84111

Walton Morris, Esq. (**wmorris@charlottesville.net**)
MORRIS LAW OFFICE, P.C.
1901 Pleasant Lane
Charlottesville, VA 22901

Sharon Buccino, Esq. (**sbuccino@nrdc.org**)
Natural Resources Defense Council
1200 New York Ave, N.W., Suite 400
Washington, DC 20005

Michael S. Johnson, Esq. (**mikejohnson@utah.gov**)
Assistant Attorney General
1597 W. North Temple, Suite 300
Salt Lake City, UT 84116

Steven F. Alder, Esq (**stevealder@utah.gov**)
Frederic Donaldson, Esq. (**freddonaldson@utah.gov**)
1597 W. North Temple, Suite 300
Salt Lake City, UT 84116

William Bernard, Esq. (**attorneyasst@kanab.net**)
Kane County Attorney
78 North Main Street
Kanab, UT 84741

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners, vs. UTAH DIVISION OF OIL, GAS & MINING and ALTON COAL DEVELOPMENT, LLC, Respondents.	**Declaration of Chris McCourt** Docket No. 2009-019 Cause No. C/025/0005

DECLARATION

I, Chris McCourt, declare under penalty of perjury as follows:

To the best of my personal knowledge each of the facts set forth below is true, and if called upon I could and would testify regarding the following. This declaration is filed in opposition to the Motion for Certification of Board Members' Status Concerning Financial Interests in Coal Mining Operations and For Recusal of Each Member who Holds any Such Interest that the Board's Decisions May Affect, filed by the Utah Chapter of the Sierra Club et al in the above-captioned matter.

1. I am a citizen of the United States over the age of 21 years and of sound mind.

2. I am the Project Manager of Alton Coal Development, LLC's ("Alton") Coal Hollow Mine.

3. Alton is a privately-held limited liability company organized under the laws of the State of Nevada.

4. Alton is the sole owner and operator of the proposed Coal Hollow Mine in Kane County, Utah and associated water rights, rights of way, permits, surface leases, underground coal leases and pending federal coal lease application (collectively "Coal Hollow Mine").

5. Alton has no interests or operations in Utah other than the Coal Hollow Mine and a rail load out area lease and office lease in Iron County, Utah.

6. I am aware of the persons and entities owning interests in Alton.

7. I prepared the statement of ownership and control for Alton that appears in the Coal Hollow Mine Permit Application.

8. I understand the members of the Utah Board of Oil, Gas & Mining ("The Board") to be Douglas E. Johnson, Chairman, Jake Y. Harouny, Samuel J. Quigley, Jean Semborski, Ruland J. Gill, Jr., James T. Jensen, and Kelly L. Payne.

9. No Board member is a member, officer or employee of Alton.

10. No spouse, child, or relative of any Board member is a member, officer or employee of Alton.

11. No Board member is an owner or part owner of any lands, mineral rights, water rights, stocks, bonds, debentures, warrants, membership interest or other holding constituting a financial interest in Alton.

12. I am aware of no spouse, child, or relative of any Board member who is an owner or part owner of any lands, mineral rights, water rights, stocks, bonds, debentures, warrants, membership interest or other holding constituting a financial interest in Alton.

12. No Board member has a direct or indirect financial interest in Alton.

13. I am aware of no way in which any Board member will directly or indirectly benefit from the issuance of a mining permit to Alton.

Pursuant to Utah Code § 78B-5-705, I DECLARE, under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of March, 2010, in Salt Lake City, Utah.